

**DISSENT RESUME**

**02097 - [A1322281]**

**[Protest to Bids Alleged to Be Nonresponsive]. D-187979. May 6, 1977. 4 pp.**

**Decision re: Conic Corp.; by Paul G. Denbling (for Elmer B. Staats, Comptroller General).**

**Issue Area: Federal Procurement of Goods and Services (1900).**

**Contact: Office of the General Counsel: Procurement Law 2.**

**Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).**

**Organization Concerned: Department of the Army: Army Missile Command, Redstone Arsenal, AL; PDR Electronics, Inc.**

**Authority: A.S.P.R. 2-405 (iv) (c). S.P.R. 3-1203. D-180530 (1974). D-186404 (1976). D-179505 (1978). 54 Comp. Gen. 66.**

**A bidder for supply of telemetry kits claimed that three low bids were nonresponsive and nonresponsible because of failure to include requested information and inability to meet specifications at prices quoted. Bids were not found to be nonresponsive and GAO does not review determinations of responsibility in the absence of fraud. (HTU)**

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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20545**

*Wickers  
P.L.I.*

**FILE: B-147979**

**DATE: May 4, 1977**

**MATTER OF: Conic Corporation**

**DIGEST:**

1. Failure of bidder to supply information in bid relative to waiver of first article testing does not render bid non-responsive where bidder was not attempting to obtain waiver. Also, review of IFB shows no requirement for bidder to designate transmitter offered.
2. "Disclosure Statement - Cost Accounting Practice and Certifications" is only required to be completed in negotiated and not formally advertised procurement.
3. Failure of bidder to supply requested information under "Freight Classification Description Clause" does not render bid nonresponsive, since information was merely advisory and Government retained right to determine proper freight classification.
4. Determination of whether offered item meets specifications is function of procuring agency and GAO will accept judgment of agency absent showing that judgment is clearly in error, which showing has not been made by protester.
5. Allegation that low bidder submitted unreasonably low bid is no basis to challenge award, since question of whether bidder can perform at bid price is matter of responsibility and affirmative determination of responsibility is not reviewed unless fraud on part of contracting officials has been alleged or it is shown that solicitation contained definitive responsibility criteria which have not been applied. Moreover, fact that bidder may sustain loss during performance does not justify rejection of otherwise acceptable bid.

On September 20, 1976, the United States Army Missile Command issued invitation for bids (IFB) No. DAAM01-76-B-0469 for 265 tactical telemetry kits. The low bid under the IFB was submitted by PER Electronics, Inc. (PER).

The fourth low bidder, Conic Corporation (Conic), has protested the responsiveness of the three low bids received, contending award should be made to it as the low responsive, responsible bidder.

Considering first the bid of PBR, Conic alleges that the PBR bid is nonresponsive because it failed to include the information required by paragraph B-12 of the IFB entitled, "First Article Information." This paragraph advised bidders that the items to be supplied would be subjected to first article testing unless the bidder could substantiate that it had previously furnished the Government an identical or a similar item to the one being procured. If a bidder believed it was qualified for a waiver of the testing, the bidder was to supply the contract number, part number and date of first article approval of the item in the space provided in paragraph B-12. PBR left this space blank in its bid. The contracting officer has advised that PBR was not eligible for waiver of first article testing as it had not previously produced a similar item. Therefore, as PBR was not attempting to obtain the waiver, it was unnecessary to complete and, indeed, it could not complete paragraph B-12.

Secondly, Conic contends that PBR did not designate the transmitter it intended to supply under the contract in paragraph B-12 of the IFB, thus rendering its bid nonresponsive. Paragraph B-12, in part, stated:

"\* \* \* If the offeror desires to submit a bid on his own transmitter design, he may do so providing, (1) all transmitter interfaces are met; (2) contractor's test information provides evidence that his transmitter meets all performance and environmental requirements of the drawings and specifications in the attached data package listing; (3) transmitter has a current frequency allocation assignment by the DoD Joint Frequency panel and (4) has been type qualified by White Sands. The determination of how well the information presented substantiates the offeror's claim of meeting the requirements will be the sole responsibility of the Government. \* \* \*

While Conic reads the above-quoted portion of the IFB to require a bidder to designate the transmitter it offered, we believe it only advised bidders of the criteria which would be employed to determine the acceptability of the transmitter. We have found no requirement in the IFB that a bidder designate in its bid the transmitter being offered. This information was properly supplied by PBR during the preaward survey and has been considered by the Government in determining the responsibility of PBR.

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Next, Conic argues that the failure of PER to complete paragraph C-19 of the IFB, entitled "Disclosure Statement - Cost Accounting Practices and Certifications," rendered the bid non-responsive. The contracting office advised that the failure of PER to complete the paragraph was waived as a minor informality under Section 2-405(iv)(c) of the Armed Services Procurement Regulation (ASPR) (1976 ed.). We do not believe it was necessary for the contracting officer to waive the clause since it was inapplicable to the instant IFB. The disclosure statement is only required to be filed in a negotiated procurement, not a formally advertised procurement as here. See ASPR § 3-1203 (1976 ed.) and Royal Industries, B-180530, July 10, 1974, 74-2 CPD 18.

Conic also protests the failure of PER to supply the freight classification description which it alleges was required by paragraph D-5 of the IFB. Paragraph D-5 reads as follows:

**"FREIGHT CLASSIFICATION DESCRIPTION**

"Bidders (or offerors) are requested to indicate, below, the full uniform freight classification (rail) description, or the National Motor Freight Classification description applicable to the supplies, the same as bidder (offeror) uses for commercial shipment. This description should include the packing of the commodity (box, crate, bundle, loose, setup, knocked down, compressed, unwrapped, etc.) the container material (fiberboard, wooden, etc.) unusual shipping dimensions, and other conditions affecting traffic descriptions. The Government will use these descriptions as well as other information available to it to determine the classification description most appropriate and advantageous to the Government. Bidder (offeror) understands that shipments on any F. O. B. Origin contract awarded, as a result of this solicitation, will be made in conformity with the shipping classification description specified by the Government, which may be different from the classification description furnished below."

The information requested of the bidders by the above paragraph did not bind the bidders or the Government and was merely advisory. The Government retained the right to determine the proper freight classification. Therefore, the failure of PER to furnish the information had no effect on the responsiveness of its bid.

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Conic contends that the transmitter which PBR intends to supply under the contract will not meet the specifications. A preaward survey and technical evaluation have been conducted by the Army on PBR and it has been determined that PBR is a responsible bidder and that its designated transmitter is technically acceptable. The determination of whether an offered item meets the specifications is properly the function of the procuring agency and where there is a difference of technical opinion, we will accept the judgment of the procuring agency unless it is clearly or unmistakably in error. State Equipment Division of Secorp National Inc., B-186404, September 22, 1976, 76-2 CPD 270. We do not find that such a showing of error has been made.

Finally, Conic contends that PBR is bidding an unreasonably low price as its end item price was lower than the price bid by the firm from which PBR will purchase the transmitter.

Our Office has consistently held that the submission of a low price is not a basis to challenge the award. The question of whether a bidder can perform at its price is one of responsibility.

This Office does not review protests against affirmative determinations of responsibility, unless either fraud is alleged on the part of procuring officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See Central Metal Products, Incorporated, 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Affirmative determinations are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform.

Moreover, the fact that a bidder may sustain a loss in performing at its price does not justify rejection of that otherwise acceptable bid. Servrite International, Ltd., et al., B-179505, January 21, 1974, 74-1 CPD 18.

For the foregoing reasons, the protest is denied and it is unnecessary to discuss the contentions advanced by Conic with regard to the second and third low bidders.

*Paul B. Lumbly*  
For the Comptroller General  
of the United States